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83-572

NO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

FLOYD C. BALDWIN, et al.,

Petitioners,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Is the decision of the United States Court of Appeals for the Fourth Circuit upholding North Carolina's annexation statutes, and Respondent's actions thereunder, consistent with decisions of the Supreme Court of the United States and applicable constitutional principles?

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents are the cities of Winston-Salem and Charlotte, North Carolina, and their respective Mayors and members of their governing boards. Respondents respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the case of Baldwin v. City of

Winston-Salem, North Carolina, 710 F. 2d 132 (4th Cir. 1983).

## STATEMENT OF THE CASE

Petitioners ask the Supreme Court of the United States to review a decision of the United States Court of Appeals for the Fourth Circuit affirming decisions by the Middle and Western Districts of North Carolina which sustained the North Carolina annexation statutes.[1] Relying primarily on Hunter v. Pittsburgh, 207 U.S. 161 (1907) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), and applicable

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[1] Baldwin v. City of Winston-Salem (82-1761(L)) and Carlisle v. City of Charlotte (82-1768) involve annexations upheld by the North Carolina Supreme Court. (In Re Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981); In Re Annexation Ordinance 301-X, 304 N.C. 565, 284 S.E.2d 475 (1981)). Both Baldwin and Carlisle challenge annexations which were fully implemented prior to filing and remain today incorporated within the municipal Respondents. Brewer v. City of Winston-Salem (82-2120) and Raintree Homeowners Association, Inc. (82-1767) involve annexations which have been affirmed at the trial level and are now waiting review by the North Carolina Court of Appeals.

North Carolina statutes, the Federal District Court in each case dismissed the Petitioners' actions after determining that the allegations did not establish a basis for relief under the due process clause of the Fourteenth Amendment. The United States Court of Appeals for the Fourth Circuit affirmed the trial courts (710 F.2d 132) in a per curiam decision. The Fourth Circuit, relying on Hunter as well as Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), held that the Petitioners' allegations, even if true, failed to establish a claim entitling them to relief under the Fourteenth Amendment. 710 F.2d at 135.

SUMMARY

The decision of the Fourth Circuit is consistent with the decisions of the Supreme Court of the United States

interpreting the Fourteenth Amendment and this petition for writ of certiorari should therefore be denied. The Fourth Circuit correctly recognized that "it has long been held that the creation and redrawing of the political subdivisions of the state, unlike the exercise of power by those subdivisions, are peculiarly matters involving state political concerns." 710 F.2d at 134. The Fourth Circuit further observed that later decisions of the Supreme Court of the United States have reaffirmed the Hunter decision; and, that while municipal annexations are subject to scrutiny under the Fourteenth Amendment when the infringement of fundamental rights or the creation of suspect classifications are alleged, no such issue is implicated in this case. Therefore, Petitioners' allegations, even if true, would not entitle them to relief under the Fourteenth Amendment. 710 F.2d

at 135. The decision of the Fourth Circuit is consistent not only with Hunter, but also with the subsequent cases of Gomillion v. Lightfoot, supra and Holt Civic Club v. Tuscaloosa, supra.

Contrary to Petitioners' allegations, the scope of judicial review of annexations in North Carolina is not limited. Case law makes it abundantly clear that the North Carolina courts will review and decide the constitutionality of annexations and the annexation statutes. Compliance with those statutes, the courts have held, where the statutes themselves are constitutional, establishes that the annexations are not arbitrary or unreasonable.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONSISTENT WITH APPLICABLE LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. Applicable Law of the Supreme Court.

The law applicable to this case, and relied upon by the District Courts and the Fourth Circuit, is clearly set out by the United States Supreme Court in the case of Hunter v. Pittsburgh, supra (and has been followed by the Fourth Circuit in this case and in the case of Berry v. Bourne, supra). Hunter arose from a challenge of a Pennsylvania statute which permitted a larger municipality to annex a smaller one despite the fact that a majority of the citizens of this smaller municipal corporation desired not to be annexed. The plaintiffs in Hunter challenged the annexation on a number of points, including due process grounds similar to those raised in this case. Hunter at 168-169.

This Court upheld the annexation, despite plaintiffs' constitutional challenge, on the basis of the following

governing principles:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold in itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the

> consent of the citizens, or even against their protest. In all of these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the states are alone responsible for any unjust or oppressive exercise of it. Id. at 178-79.

Thus, in Hunter, this Court made it absolutely clear that the extension of municipal boundaries was a matter governed by state rather than federal law.

Petitioners have gone to great lengths in an effort to create the illusion that the legal principles supporting Hunter "have long since been

overruled and that, as a consequence, Hunter itself has lost much of its precedential force." (Petition, p. 15). Their theory as to Hunter's demise is contradicted by two recent decisions of this Court reaffirming Hunter.

In Gomillion v. Lightfoot, supra, this Court affirmed the basic principles of Hunter. While the Supreme Court originally decided to hear that case in order to consider issues under both the Fourteenth and Fifteenth Amendments, its decision was based solely upon the Fifteenth Amendment (voting rights denied on the basis of race). In doing so, the Gomillion Court expressly held:

> Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular

> prohibition of the Constitution considered in those cases. 364 U.S. at 344 (emphasis added).

Gomillion expressly recognizes Hunter to be good law. Gomillion expressly recognizes that Hunter holds that the Fourteenth Amendment's Due Process Clause does not apply to annexations by municipal corporations and re-affirms that holding. The proposition bears restatement: Gomillion expressly affirms Hunter's holding that a state's authority to modify the boundaries of its political subdivisions is "unrestrained" by the Fourteenth Amendment's Due Process Clause.

The Gomillion opinion makes it clear that its decision in reference to the Fifteenth Amendment does not alter the Hunter decision as to the application of the Fourteenth Amendment -- ". . . [I]f one principle clearly emerges from the numerous decisions of this Court dealing with taxation, it is that the Due Process

Clause affords no immunity against mere inequalities in tax burden, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political power." Id. at 343. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review." Id. at 347.

The constitutional principles established by Hunter were most recently reaffirmed by this Court in Holt Civic Club v. City of Tuscaloosa, supra. While Petitioners have quoted one statement from Holt out of context suggesting that Hunter has been "qualified by later cases" (Petition, p. 31), they fail to recognize that Holt represents a strong affirmation of the underlying principle that the circumstances presented by this case raise no issue of Fourteenth Amendment due process rights.

In Holt, the plaintiff organization challenged a state statute authorizing municipalities to exercise certain powers over persons and property within three miles of their city limits. Persons residing within the affected extra-territorial area could not vote for the city's elected officials. The Supreme Court dismissed the challenge to the state statute on the grounds that it lacked substantive merit as it "alleged no claim cognizable under the United States Constitution." Id. at 66.

In reaching its determination in Holt, this Court held that persons within the extraterritorial area did not have the constitutional right to vote on municipal policies affecting the persons and property within the subject area. Id. at 69-70. "Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama

statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose." Id. at 70.

In this regard, the Court noted the following:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' Anderson v. Dunn, 6 Wheat 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them'. Hunter v. Pittsburgh, 207 U.S. 161, 178. See also, e.g., Sailors v. Board of Education, 387 U.S., at 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964). In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the

> absolute discretion of the State.' Ibid. While the broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist., supra, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitute that States have in creating various types of political subdivisions and conferring authority upon them. Holt at 71 (footnote omitted).

Thus, it is clear that Hunter is alive and well, and is still the governing law as to the questions involved in this case.

This Court concluded "that Alabama's police jurisdiction statutes violate neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment." Id. at 75. Obviously, the same holding is appropriate in this case. As in Holt, the state statute challenged by Petitioners is a reasonable exercise of North Carolina's

power to provide for municipal government. Therefore, pursuant to Hunter and Holt, the statute is not subject to consititutional challenge. See also, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489 (1977) ("The statute does not involve any discernable fundamental interest or affect with particularity any protected class . . . [T]he test of constitutionality, therefore, is whether the statute has a rational relation to a legitimate state interest.")

B. The Law of the Fourth Circuit Is Consistent With the Law of the Supreme Court.

The decision of the Fourth Circuit in this case, Baldwin v. City of Winston-Salem, supra, and Berry v. Bourne, supra, follow the principles of Hunter, Gomillion and Holt Civic Club. Respondents respectfully submit that the Petitioners have misrepresented the Fourth Circuit

decision in Baldwin when they say "because the Fourth Circuit in this case held that arbitrary and capricious annexation did not violate federal due process, it also held that there is no federal constitutional right to have state courts hear challenges to arbitrary and capricious annexation decisions." (Petition, pp. 33-34). The court's conclusion was based on its determination that the Fourteenth Amendment is not violated where, as in the case before the court, the "proposed annexation does not impinge on fundamental rights or create suspect classifications . . . ." Indeed, the Fourth Circuit's conclusion in this regard was based on the fact that the allegations of the Plaintiffs in Baldwin, even if true, did not raise a colorable claim under the Fourteenth Amendment. Baldwin at 135. As the Fourth Circuit pointed out, the exceptions to Hunter which have been

recognized by the United States Supreme Court in Gomillion and Holt have not been alleged in this case. "No suspect classification or fundamental right is therefore implicated and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution." Baldwin at 135.

Support for the Fourth Circuit's decision in Baldwin is also found in the decision of Judge McMillan of the Western District of North Carolina in Raintree Homeowners Association v. Charlotte, 543 F.Supp. 625 (W.D.N.C. 1982), one of the four cases consolidated in the Fourth Circuit. The Federal District Court in that case stated:

> Assuming arguendo, that the due process clause of the Fourteenth Amendment gives the plaintiffs the right to argue on appeal that the annexations are unreasonable, the plaintiffs nonetheless would not be entitled to the relief they seek under their first cause of action. N.C.G.S.

> 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Superior court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the City. 543 F.Supp. at 629.

The governing decision in the Fourth Circuit prior to Baldwin, Berry v. Bourne, supra, properly construed the relationship between Hunter and Gomillion. Hunter, the Berry Court said:

> has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds. The single exception to the rule, [citing Gomillion in a footnote] which subsequent decisions have established, is confined to challenges resting on alleged racial discrimination. We are not concerned here with a racial claim, only with an equal protection claim. Berry at 423-24 (footnotes omitted).

Thus in Berry, as in other decisions of the

Fourth Circuit, involuntary annexations have been upheld as being consistent with the U.S. Constitution. See Citizens Committed to Oppose Annexation v. City of Lynchburg, 528 F.2d 816 (4th Cir.), application denied 423 U.S. 1043 (1976); Garren v. City of Winston-Salem, 463 F.2d 54 (4th Cir.), cert. denied 409 U.S. 1039 (1972); Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972) (three-judge district court).[2]

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[2]Petitioners allege (Petition, p. 32, n.5) a "division in the circuits" based on Doyle v. Municipal Commission of Minnesota 340 F.Supp. 841 (D. Minn.), aff'd,468 F.2d 620 (8th Cir. 1972); and Adams v. City of Colorado Springs, 308 F.Supp. 1397, 1405 (D.Colo.), aff'd 399 U.S. 901 (1970). Respondents note that these decisions are not federal court of appeals decisions as called for under Rule 17.1(a) of the Revised Rules of the Supreme Court of the United States. Doyle considered the reasonableness of statutory provisions for judicial review. Doyle at 844. Adams dealt with the reasonableness of the statutory classification of areas for annexation. Adams at 1403-04. In both cases, the decisions of the court were to uphold statutory provisions. Respondents respectfully submit that these decisions are not inconsistent with the position of the Fourth Circuit.

II. THE NORTH CAROLINA SUPREME COURT DOES REVIEW ANNEXATIONS TO DETERMINE REASONABLENESS AND COMPLIANCE WITH DUE PROCESS AS WELL AS OTHER CONSTITUTIONAL STANDARDS.

Petitioners' request for review by this Court is also based on their assertion that under North Carolina law judicial review of annexations is limited and that the North Carolina Supreme Court will not review the constitutionality or reasonableness of municipal annexations. (Petition, pp. 32-33) The Petitioners are simply incorrect with reference to this basic premise. It is very clear from the decisions of the North Carolina Supreme Court that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Petitioners.

The first decision concerning the constitutionality of the annexation statutes

at issue in this case considered all manner of constitutional questions including whether those statutes violated due process of law under the Fourteenth Amendment of the U.S. Consititution. In Re Annexation Ordinance No. 866, 253 N.C. 637, 640-41, 117 S.E.2d 795, 798 (1961). In this seminal decision, it was held that the procedures provided by the statutes are substantial ones which protect the rights of newly-annexed citizens.

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas; comparable to the services

provided for the residents within the city prior to annexation of the new area or areas. 253 N.C. at 647, 117 S.E.2d at 802.

In view of its judicial review of and interpretation of the statutes, the North Carolina Supreme Court held that they were not in violation of due process.

> The petitioners contend that by reason of these annexations in the manner in which they have been brought about, they have been deprived of their liberty and property without due process of law, in violation of Article I, Section 17 of the Consitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The record in these proceedings does not support the petitioners' contention in this respect. Certainly it would seem that they do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the

> of the State and Federal Constitutions. 253 N.C. at 651-52, 117 S.E.2d at 805.

With respect to whether or not the North Carolina court will review "reasonableness", the North Carolina Supreme Court said in Moody v. Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980): "The review (of annexations) is afforded pursuant to G.S. 160A-50 and serves as a safeguard against unreasonable and arbitrary action by the annexing municipality." The principle that compliance with a constitutional statute established constitutional reasonableness was recognized by Judge McMillan in Raintree Homeowners Association v. City of Charlotte, supra, one of the cases joined in this Petition.

> N.C.G.S. 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Superior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of

> the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the city.

Id. at 629.

The willingness of the North Carolina Supreme Court to consider constitutional questions other than "reasonableness" which are properly raised in state court proceedings is fully illustrated by its consideration of the same annexations which are at issue in the Baldwin case. In Re Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981). In that case, the North Carolina Supreme Court considered several constitutional questions and addressed generalized grievances concerning the "reasonableness" of the annexations and held: (1) that the annexation statutes were not an unconstitutional delegation of authority by the state to the governing boards of municipalities; (2) that the statutes were not

unconstitutionally vague; (3) that the fact that persons residing within the annexed areas did not get to vote on the matter did not violate either due process or equal protection; (4) that the residents of the annexed areas were protected in their rights to receive municipal services such that no constitutional questions were at issue in that regard; (5) that unilateral annexation was not unconstitutional as "taxation without representation" pursuant to either due process or equal protection guarantees; and, (6) that the annexation statutues were not unconstitutional on the grounds that judicial review if provided by a judge sitting as trier-of-fact, rather than by way of a jury trial. 303 N.C. at 224-30, 278 S.E.2d at 228-30.

It is obvious that the North Carolina Supreme Court was more than willing to review, and in fact did review, constitutional questions raised in reference to

the annexations involved in the Baldwin case. Moreover, it is apparent from that opinion and numerous other cases that the North Carolina Supreme Court has frequently reviewed these issues in annexation cases. For example, the state courts have considered the applicability of due process guarantees of the Fifth Amendment of the U.S. Consititution, in addition to those guarantees provided by the Fourteenth Amendment. E.g., Moody v. Town of Carrboro, supra. The state courts have applied an equal protection analysis in appropriate instances (unlike the annexations herein challenged). E.g., Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). The North Carolina Supreme Court has demonstrated its willingness to declare annexations to be invalid. E.g., Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980); see also, Gaskill v. Costlow, 270 N.C. 686,

155 S.E.2d 148 (1967). The North Carolina Supreme Court will consider whether an annexation based solely upon the desire to generate revenue is invalid. See, In Re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 19, 249 S.E.2d 698, 708 (1978). Further, consistent with the foregoing authority, the state court will consider impropriety in the annexation process itself if allegations of the same are supported by "competent and substantial evidence". In Re Annexation Ordinance Adopted by the City of Charlotte, 284 N.C. 442, 452, 202 S.E.2d 143, 149 (1974) (challenging an annexation on grounds that "the City 'acted arbitrarily, capriciously, and unreasonably in that it did not uniformly apply the same standards throughout the entire Annexation Area'"). In the Charlotte case cited above, the North Carolina Supreme Court found the annexation of petitioner's land to be invalid

and reversed the inclusion of petitioner's lands within the annexed area on the basis of an unreasonable application of the annexation statutes. 284 N.C. at 457, 202 S.E.2d at 152.

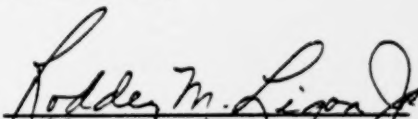
It is clear from these opinions that the statutory annexation requirements are carefully reviewed to ensure compliance with constitutional principles.

CONCLUSION

Respondents respectfully submit that the per curiam decision of the United States Court of Appeals for the Fourth Circuit is consistent with long-standing principles of law articulated by the United States Supreme Court. The challenged decision of the Fourth Circuit creates no division among the Circuit Courts. Also, the constitutionality of the North Carolina annexation statutes and the review afforded in state court under those statutues has been established in both state and

federal courts. As the Federal District Courts and Fourth Circuit Court of Appeals recognize in this case, Petitioners' allegations even if found to be true would not entitle them to relief under the due process clause. For the reasons set forth above, Respondents respectfully submit that the writ of certiorari to the United States Court of Appeals of the Fourth Circuit should be denied.

Respectfully submitted,



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